

Hon Andrew Little, Minister of Justice and Minister for Courts

Draft Cabinet Paper: Establishment of Canterbury Earthquakes Insurance Tribunal

Date	30 January 2018	File reference	CRT-48-01
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Action sought

Timeframe

Indicate your decisions on three aspects of the Canterbury Earthquakes Insurance Tribunal.	By Monday 5 February 2018
Undertake Ministerial, coalition and support party consultation on the attached draft Cabinet paper.	By Monday 12 February 2018

Contacts for telephone discussion (if required)

Name	Position	Telephone		First contact
		(work)	(a/h)	
Ruth Fairhall	Deputy Secretary, Policy	04 498 2399	s9(2)(a)	<input type="checkbox"/>
Andrea King	General Manager, Courts and Justice Services Policy	04 466 1558		<input type="checkbox"/>
Megan Noyce	Principal Advisor, Courts and Tribunals Policy	04 494 9828		<input checked="" type="checkbox"/>

Minister's office to complete

<input type="checkbox"/> Noted <input type="checkbox"/> Approved <input type="checkbox"/> Overtaken by events <input type="checkbox"/> Referred to: _____ <input type="checkbox"/> Seen <input type="checkbox"/> Withdrawn <input type="checkbox"/> Not seen by Minister Minister's office's comments

In Confidence: Budget Sensitive

Purpose

1. This briefing:
 - 1.1. attaches a draft Cabinet paper seeking approval to establish the Canterbury Earthquakes Insurance Tribunal (“the Tribunal”), for your review, and, if you agree, for Ministerial, coalition and support party consultation;
 - 1.2. seeks your direction on three aspects of the new Tribunal;
 - 1.3. attaches a Regulatory Impact Statement (RIS) for your information; and
 - 1.4. indicates timeframes for lodging the Cabinet paper and RIS for consideration by the Cabinet Social Wellbeing Committee on Wednesday 21 February.

Executive Summary

2. You have indicated that you wish to establish the Canterbury Earthquakes Insurance Tribunal to provide an alternative pathway for claimants to resolve outstanding earthquake-related insurance claims. If the Tribunal is to be operational by the end of 2018, a Bill will need to be introduced in May 2018, with a view to enactment by October 2018.
3. Cabinet decisions are needed in February in order to give Parliamentary Counsel Office sufficient time to draft the Bill. The attached draft Cabinet paper sets out the high-level Cabinet decisions that are required.
4. Your direction is needed on three matters. We recommend:
 - 4.1. limiting appeal rights so the first appeal is only with leave of the High Court, and bypasses the District Court (for lower-value claims), but is still permitted on matters of fact and law;
 - 4.2. the Tribunal be empowered to direct parties to mediation, unless it is unlikely to assist, with mediation occurring after claimants file with the Tribunal; and
 - 4.3. the Tribunal should be able to award costs if a party has caused the costs to be incurred unnecessarily or has not participated in mediation in good faith.

Draft Cabinet paper

5. In accordance with your decisions on our briefing of 13 December 2017, the attached Cabinet paper proposes to establish a new Tribunal to help resolve residential property and land insurance claims related to the 2010 and 2011 Canterbury-earthquakes.
6. Due to the tight timeframes, the draft Cabinet paper reflects our recommendations on three issues on which we are seeking your policy approvals in this briefing. If you agree to our approach to these issues, we recommend you consult with your Ministerial, coalition and support party colleagues on the attached paper, prior to lodging the paper with the Cabinet Office on 15 February. If you direct a different approach on any of these issues, we can redraft the paper in accordance with your preferred approach, for you to complete the necessary consultation.

7. The Cabinet paper notes that the recommendations are subject to Budget 2018 decisions.

s9(2)(f)(iv)

Subject to Cabinet and Budget 2018 decisions, you may wish to make a pre-Budget announcement so that claimants and insurers are aware of the Government's intended approach at the earliest opportunity.

The Tribunal will have standard best-practice settings, powers and processes

8. The draft Cabinet paper sets out the key policy settings for the new Tribunal, such as the Tribunal's jurisdiction, membership, powers and processes. The paper proposes that the Tribunal processes will incorporate funded mediation, to encourage earlier resolution of disputes. It also proposes that the Tribunal will utilise independent experts. There will be no cost for claimants to access the Tribunal, although claimants will need to meet their own legal costs (unless they meet the criteria for legal aid) or costs of other expert advice and representation.
9. The appointment process will enable you to recommend Tribunal members for appointment with suitable skills, including significant legal experience. The draft Cabinet paper notes that up to ten appointments will be made, following consultation with the Minister for Greater Christchurch Regeneration.
10. Consistent with the approach taken in the Weathertight Homes Tribunal, which we have used as a model, the draft Cabinet paper proposes that the Tribunal determine claims in accordance with general law. This includes the application of precedent developed by the courts in response to legal issues arising from Canterbury earthquake insurance claims.
11. The Tribunal will have the same powers as the courts to award general damages, which include damages for distress caused by undue delay.

Your direction is sought on three outstanding policy matters

12. We seek your direction on three key aspects of the Tribunal namely:
- 8.1 preserving limited appeal rights;
 - 8.2 the timing of mediation; and
 - 8.3 the awarding of costs and expenses.
13. Further decisions will be needed on detailed aspects of the Tribunal over the next two months. The Cabinet paper therefore recommends authorising you to take any further detailed policy decisions that may arise during the drafting of the Tribunal Bill, in consultation with the Minister for Greater Christchurch Regeneration.

Proposal: Limit first appeals by requiring leave from the High Court

(see draft Cabinet paper paragraphs 39 to 42)

14. The 2017 Labour manifesto statement indicated that limited appeal rights from a Tribunal would be preserved. There are several factors to balance when considering how to design appeal rights, including:

- 14.1. upholding the principles of natural justice;
 - 14.2. providing speedy and cost-effective resolution (any appeal process risks delaying settlement, and increases costs);
 - 14.3. ensuring accurate fact-finding and correct interpretation of the law; and
 - 14.4. encouraging parties to engage with the Tribunal, rather than filing claims in the courts simply to ensure access to the usual appeal rights.
15. The standard approach to appeals, where a tribunal is a first-instance decision maker, is to provide a right of appeal to the next Court on matters of fact and law. This preserves natural justice, allowing both factual and legal errors to be corrected. Second and subsequent appeals are usually available on matters of law, and usually only upon leave of the appellate Court.
16. **We recommend** that a first appeal from the Tribunal should be permitted only with the leave of the High Court, although appeals should be able to be made on matters of fact and law. This approach:
- 16.1. bypasses the District Court for the few appeals valued under \$350,000 that would fall under its jurisdictional limits;
 - 16.2. reduces the risk of unmeritorious appeals and associated costs and time delays, by requiring leave of the High Court;
 - 16.3. maintains natural justice, by providing parties with the opportunity to appeal the Tribunal's fact-finding and interpretation of the law where such an appeal is judged to have merit;
 - 16.4. provides a meaningful appeal pathway so claimants are not deterred from filing with the Tribunal; and
 - 16.5. enables complex or novel points of law arising from the Tribunal's decisions to be adequately reviewed and addressed by a precedent-setting court.
17. We recommend that second and subsequent appeals be allowed with leave of the appellate court, on matters of law only.
18. We also considered, but do not recommend, several alternative options for limiting first appeals. These are set out in the Appendix.

Proposal: The Tribunal is empowered to direct parties to funded mediation

(see draft Cabinet paper paragraphs 32 to 34)

19. We are seeking your direction on whether mediation should be available prior to filing a claim at the Tribunal, or whether the Tribunal should serve as the gateway to accessing mediation.
20. One approach is for funded mediation to be available *before* a claim is filed with the Tribunal. Conceptually this maintains the Tribunal as a 'last step' in the settlement process.

Under this approach, MBIE could act as a clearing house, linking claimants to a range of appropriate services, including mediation.

21. However, this approach might be perceived by some claimants as delaying their ability to access the Tribunal. Therefore, **we recommend** that parties have access to funded mediation *after* a claim is filed, at the direction of the Tribunal. This appears more consistent with your policy directions regarding the purpose of the Tribunal. In particular:
 - 21.1. parties are more likely to participate meaningfully if the Tribunal is monitoring progress and it is clear that the Tribunal will make a determination if mediation is unsuccessful;
 - 21.2. the Tribunal can take a strong and proactive case management role from the start, helping identify issues in dispute, clarifying who is involved in the dispute, and setting timeframes, to increase the likelihood of mediation success; and
 - 21.3. it does not risk mediation being seen as a barrier to accessing the Tribunal.
22. We also seek your direction on whether mediation should be a mandatory part of the Tribunal process, or a voluntary option requiring parties' consent. **We recommend** a soft-compulsion model, which would empower the Tribunal to direct parties to mediation, which would generally be expected to occur early in the process, unless the Tribunal considers mediation is unlikely to succeed.
23. A soft compulsion approach is consistent with the purpose of the Tribunal. Parties may need encouragement to consider mediation. There is evidence from similar schemes, including the Weathertight Homes Tribunal, that once started, mediation can lead to voluntary resolution more quickly, or assist with narrowing down issues.
24. If mandatory, mediation could still help reduce the number of cases needing formal determination. But where claims have been unresolved for a considerable period of time and there is little chance of agreement, it may unnecessarily delay settlement and add to claimants' frustration if it is perceived as another 'hoop' to jump through.

Proposal: The Tribunal is able to award costs and expenses

(see draft Cabinet paper paragraphs 43 - 44)

25. The 2017 Labour Party manifesto indicated there will be no filing fees for the Tribunal. However, parties may still incur significant legal and expert costs. We are seeking your direction on the extent to which the Tribunal will be able to award costs against parties.
26. **We recommend** that the Tribunal be able to award costs and expenses against any party:
 - 26.1. if that party has caused the costs to be incurred unnecessarily by bad faith or objections without substantial merit; or
 - 26.2. if the Tribunal considers the dispute should have been settled by mediation but the party refused to attend or participate in mediation in good faith.
27. This approach is more limited than the courts, which have full discretion to award costs and expense, but:

27.1. allows the Tribunal to consider awarding costs as a way of encouraging parties to focus on quick resolution; and

27.2. protects claimants against exposure to a high financial risk, possibly making filing with the Tribunal more attractive to some claimants.

28. This approach is consistent with provisions in tribunals such as the Disputes Tribunal and the Weathertight Homes Tribunal, which can make awards if a party has caused costs to be incurred unnecessarily. The Tenancy Tribunal can also make awards if the dispute ought reasonably to have been settled by agreement (i.e. mediation) before any hearing.

There are some risks around availability of qualified personnel to resource the Tribunal

29. As highlighted in our briefing of 13 December 2017, the availability of experienced technical experts is already impacting on parties' ability to conclude settlement discussions, and poses a significant risk to the Tribunal's success (see draft Cabinet paper paragraph 35-38). You referred this issue to the Minister for Greater Christchurch Regeneration, and asked her to explore options for more efficient use of experts' services.

s9(2)(f)(iv) [Redacted]

30. s9(2)(g)(i) and s9(2)(f)(iv) [Redacted]
[Redacted]
[Redacted]
[Redacted]
[Redacted]

Regulatory Impact Statement

31. The attached RIS sets out our analysis of this proposal. It will accompany the Cabinet paper when it is considered by Cabinet, and will be published when the Bill is introduced to the House.

32. The RIS provides information about the development and content of proposed legislation. Its purpose is to ensure that regulatory options are subject to careful and robust analysis, and that this analysis has been independently assessed.

33. As a departmental document, a RIS summarises our advice on the impact analysis. Our analysis suggests that a combination of stand-alone mediation, and additional targeted resourcing to enhance existing support services, best meets the policy objective.

Next Steps: Process and Timeframes

34. In your legislation bid to the Cabinet Legislation Committee, you indicated that you wish to introduce a Canterbury Earthquakes Insurance Tribunal Bill in May 2018, with a view to enactment by October 2018. The process required to draft and introduce legislation makes this a tight timeframe.

35. You have written to the Attorney-General seeking his approval for the Parliamentary Counsel Office (PCO) to begin drafting the generic provisions of the Bill in advance of

Cabinet decisions. Cabinet policy decisions are needed in February to enable PCO to complete the Bill for introduction in May.

36. The timetable below sets out the next steps if you wish the Cabinet paper to be considered by the Social Wellbeing Committee on Wednesday 21 February.

Date	Action
By Mon 5 February	Your decisions on this briefing, and initial feedback on the Cabinet paper required.
Mon 5 – Mon 12 February	Ministerial and coalition and support party consultation <i>Note: If necessary, we will redraft the attached cabinet paper to reflect your decisions on this briefing and provide an updated version by Wednesday 7 February to assist you with this consultation.</i>
Wed 13 February	Finalised Cabinet paper provided to your office following Ministerial consultation.
Thurs 15 February (by 10am)	Submit the final Cabinet paper and RIS to Cabinet Office
Wed 21 February (9.30am)	Cabinet Social Wellbeing Committee <i>We can provide you with talking points for the Committee. Officials will be available to support you during the meeting, if required.</i>
Mon 26 February	Cabinet

Recommendations

37. We recommend that you:

1. **Provide** your feedback on the attached draft Cabinet paper, which seeks Cabinet approval for the establishment of the Canterbury Earthquakes Insurance Tribunal (“the Tribunal”).
2. **Note** that Cabinet decisions on establishing the Tribunal are subject to funding being agreed as part of Budget 2018.
3. **Agree** that the first appeal from the Tribunal be directly to the High Court only on the leave of the High Court, on matters of fact and law. YES / NO
4. **Agree** that second and subsequent appeals be permitted on matters of law, and with leave of the appellate court. YES / NO
5. **Agree** that funded mediation should become available following the filing of a claim with the Tribunal. YES / NO

6. **Agree** that the Tribunal be empowered to direct parties to mediation unless it considers that mediation is unlikely to assist in the resolution of a case. YES / NO
7. **Agree** that the Tribunal can award costs and expenses against any party if that party has caused the costs to be incurred unnecessarily by bad faith or objections without substantial merit. YES / NO
8. **Agree**, if recommendations 5 and 6 are agreed, that the Tribunal can award costs and expenses if it considers the dispute should have been settled by mediation but the party refused to attend or participate in mediation in good faith. YES / NO

Ruth Fairhall
Deputy Secretary, Policy

APPROVED SEEN NOT AGREED

Hon Andrew Little
Minister of Justice

Date / /

Attachments:

- Draft Cabinet Paper: Establishment of Canterbury Earthquakes Insurance Tribunal
- Regulatory Impact Statement: Canterbury Earthquakes Insurance Tribunal

Appendix: Options for limiting appeals

1. The table below sets out alternative options for limiting first appeals from the proposed Tribunal.

Option	Example	Ministry Comment
First appeal by way of rehearing in the same tribunal, with subsequent right to appeal to District Court on fact and law (with some limitations)	Disputes Tribunal Tenancy Tribunal <i>Note: these are both low-value high-volume tribunals.</i>	<ul style="list-style-type: none"> • Low cost and accessible appeal, likely to be attractive for claimants. • May not be perceived as independent review, as still at Tribunal level. • If parties still likely to seek to refer to the courts, may just add an additional administrative layer and not speed up resolution.
First appeal directly to High Court, as of right	Copyright Tribunal Human Rights Tribunal Tax Review Authority (depending on amount at issue)	<ul style="list-style-type: none"> • For small number of claims (under \$350,000) removes one level of appeal. • Risk that parties automatically appeal to the High Court, meaning Tribunal becomes an additional step in process and does not speed up resolution.
First appeal limited to matters of law	Copyright Tribunal	<ul style="list-style-type: none"> • May speed resolution, as Tribunal's decision on fact would be final. • Is very restrictive and compromises principles of natural justice • May risk parties avoiding the Tribunal's jurisdiction altogether, and filing directly in the courts to preserve their appeal rights.

2. We have not considered the Weathertight Homes Tribunal model for appeals, as it only allows one level of appeal, on matters of fact and law (either to the District Court or the High Court, depending on the amount claimed). We do not consider this appropriate in Canterbury earthquake cases due to the risk that complex or novel points of law may arise from the Tribunal's decisions.